# Alabama Sentencing Commission

Minutes of Commission Meeting
December 3, 2004

The Alabama Sentencing Commission met in the Mezzanine Classroom of the Judicial Building in Montgomery on Friday, December 3, 2004. Present at the meeting were:

Hon. Joseph Colquitt, Chairman, Retired Circuit Judge, Professor, University of Alabama School of Law, Tuscaloosa
Hon. David Rains, Circuit Judge, 9th Judicial Circuit, Fort Payne
Hon. Ben McLauchlin, Presiding Circuit Judge, 33rd Judicial Circuit, Ozark
Lou Harris, D.P.A., Faulkner University, Montgomery
Bill Segrest, Executive Director, Pardons and Paroles, Montgomery
Donal Campbell, Commissioner, Department of Corrections, Montgomery
Ellen Brooks, District Attorney, 15th Judicial Circuit, Montgomery
Terri Bozeman, District Judge, Lowndes
Joe Reed, Jr., Faulk & Reed L.L.P., Montgomery
Rosa Davis, Chief Assistant Attorney General, Montgomery

Advisory Council:
Denis Devane, Birmingham
Adolph South, Tuscaloosa

Others Attending:
Robert Ray, Defense Attorney
Miriam Shehane, Executive Director, VOCAL, Montgomery
Steve Hayes, Department of Corrections, Montgomery
Rosemary Collins, Alabama CURE
Mitzie Wheat, VOCAL, Montgomery

Staff:
Lynda Flynt, Executive Director
Chris Booth, Staff Attorney
Melisa Morrison, Senior Research Analyst

**Welcome and Introductory Remarks**

The meeting convened at 10:00 a.m.. Chairman Colquitt called the meeting to order and made introductory remarks. He introduced and welcomed Denis Devane as a new member of the Commission's Advisory Council.

Judge Colquitt advised the Commission members that there were a number of items on the agenda, which included bills that would be proposed. He noted the Commission was in the final stages of preparation for the 2005 legislative session, with

rather extensive reports coming out of the Legislative and Standards committees with regard to proposed bills.

In regard to the Commission's 2005 Annual Report, Judge Colquitt told the members that Lynda, Rosa, and staff were currently very involved in writing the report to submit to the Legislature. By law, the Commission is required to submit an annual report. At the last Commission meeting the members voted to authorize the staff to prepare the report.

Updating the Commission on the current status of the *Blakely* decision, Judge Colquitt noted that there were two cases, *Booker* and *Fan Fan,* with regard to federal guideline sentencing currently before the United States Supreme Court. These recently argued cases specifically involve federal guideline sentencing guidelines which are mandatory in nature. He explained that those guidelines don't have any real relationship to what the Commission has been doing but there has been a lot of debate around the country about just what the United States Supreme Court is going to say about the federal guidelines. He noted that the Supreme Court struck down the state of Washington and New Jersey guidelines and has ruled unconstitutional sentencing practices in Arizona in the cases of *Apprendi, Ring* and *Blakely*. Judge Colquitt stated that this is not a liberal verses conservative issue with the Court, because justices on both sides of the political spectrum are joining together to create a new majority on these issues. He mentioned that it was recently reported in the news that federal sentencing in criminal cases was down 28% from last year, which means that federal judges across the country are waiting to hear what the Supreme Court is going to do. From all indications, He said that a ruling in the Booker/Fan Fan case on the constitutionality of the federal sentencing guidelines should be forthcoming this week.

Judge Colquitt told the Commission that a number of the Commission's bills that were introduced unsuccessfully last year would be considered for introduction this year; noting that there would be a rather extensive report on those bills and a vote taken on whether they should be included in the 2005 Legislative package.

Judge Colquitt told the members that another topic for discussion at this meeting would be the Alabama Supreme Court's ruling in *Ex Parte Kirby* with regard to retroactive application of the amendments to the habitual felony offender statute, in which the work of the Commission was mentioned. Judge Colquitt noted that the opinion showed some miscommunication or misunderstanding of the Sentencing Commission's role in the process, particularly regarding what we were asked to do, what we did, and why we did what we did. Recognizing that there are some who think that the Sentencing Commission should be taking the lead to resolve the problems with this legislation, Colquitt stated the main issues that need to be addressed are procedural in nature and could have either been answered by the Supreme Court itself in the *Kirby* decision or could be addressed by the Supreme Court's Advisory Committee on the Rules of Criminal Procedure, a standing body that was established and operates for that exact purpose. He noted that although the issue was brought before the Criminal Rules Committee, the Committee declined to make any recommendations. Judge Colquitt

stated that he would recommend referring this matter to the Criminal Rules Committee, the committee that has been established to write rules of procedure. He opined that the Sentencing Commission needs to focus its attention on its charge - to develop sentencing laws for the Legislature, sentencing reform and many other things. He pointed out that the Commission had no rule making power and no authority to promulgate Rules of Criminal Procedure. He noted that one way, and probably the quickest, to resolve the problem would be for the Supreme Court to adopt a rule of criminal procedure. Another way would be for the Legislature to adopt a law establishing the procedure. Colquitt noted that the Sentencing Commission couldn't do anything other than make a recommendation. Judge Colquitt stated that the Commission needs to define how the Commission is going to react to the *Ex Parte Kirby* decision and to the fact that other agencies or bodies have chosen not to act in areas where they have not only a charge to do so, but also the expertise with regard to procedural matters.

There was a general discussion among the members about the number of inmates whose life without parole sentence had been changed to a life sentence or life sentence had been changed to 20 years. Judge Colquitt stated that we might need to get a report from the judges around the state on how they are ruling on these petitions, but the members would later be asked to express their opinion regarding the drafting of a procedure to implement the retroactive amendments of the Habitual Felony Offender Act under the *Kirby* opinion, particularly whether it was something that should be considered by the Alabama Sentencing Commission or more appropriately the responsibility of the Rules of Criminal Procedure Committee.

**Sentencing Standards and Worksheet Committee Report**

Rosa Davis, Chair of the Sentencing Standards and Worksheet Committee, reported that at the last meeting preliminary approval was given to most of the draft of what the Sentencing Standards and Worksheets committee presented after taking the standards and worksheets and instructions to the public during the summer and conducting the twelve workshops. She also noted that the committee took the recommendations received from the Commission at the Commission's last meeting and made the recommended changes. Ms. Davis then reported on the work of the committee

The Commission members reviewed the general instructions, worksheets and standards dated December 3rd and the changes that were made since the last Commission meeting:

> First page of the general instructions – the Committee added the code sections to the offenses for clarification
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> Page 3 of the general instructions, instruction 9 - When completing the worksheets, matters disposed of by pleas of nolo contendere or no contest should be counted as prior convictions. In addition, any incarceration resulting from a plea of nolo contendere or no contest should be counted in the appropriate places on the worksheet. The Standards and Worksheets Committee reconsidered the effect of pleas of nolo contender and recommended this change because some jurisdictions in Alabama get a good many prior

criminal histories that include out-of-state pleas of nolo contendere. The Committee felt that these pleas should be counted on the worksheet even though Alabama courts have held they are not equivalent to criminal convictions and can't be used for Habitual Felony Offender Act enhancement purposes. In looking at criminal history, judges do consider the fact that the offender has been before a court and entered that plea and received punishment. In was noted that in most states these pleas are handled as prior convictions in deciding criminal history. The committee went back to the data and used the electronic PSIs and reviewed 3000 electronic PSIs that contained criminal history. Out of those 3000, thirty (30) were found that included prior offenses disposed of by pleas of nolo contendere. Looking at that and looking at all of data together, the committee concluded that pleas of nolo contender should be counted as prior convictions for worksheet purposes. It was emphasized that this was not for Habitual Offender Act purposes, just for worksheet purposes, without doing harm to the statistical base of the worksheets.

A glossary of terms will be added to the instructions and worksheets and nolos will be included under "convictions" for worksheet purposes in that glossary of terms. The glossary of terms will define some of the words used throughout the instructions, worksheets and sentencing standards. That's two recommendations: 1) change #9 and 2) add a glossary of terms.

Instruction #15 was changed to clarify the use of prior DUI offenses. There was some discussions about whether or not we had really stated this correct legally. Based on a suggestion from Judge Rains, the instruction was changed to refer to all previous convictions rather than prior offenses.

Instruction 16 – The obligation to advise the defendant as to the statutory range of punishment prior to accepting a guilty plea is not affected by the standards. It was explained that the members of the Standards Committee had tried to figure out exactly what the defendant should be advised regarding the standards when (s)he entered a guilty plea. It was determined by defense lawyers, DAs and victims advocates (everyone at the meeting agreed) that the language that should be used was – "the court's obligation to advise the defendant as to the statutory range of punishment prior to accepting a guilty pleas is not affected by the standards."

Instructions for completing drug offense worksheets; worksheet #1 (drug prison in/out worksheet) - There was a good bit of discussion by the members of the Standards Committee regarding what a prior incarceration should include. It was decided that in counting prior incarcerations, sentences to the DOC should count even though they may end up in community corrections. Any sentence to the Department of Corrections that is unsuspended, even if that person ends up back in the community, should be counted as an incarceration since it was counted as incarceration when we conducted our statistical analysis. Community corrections sentences to the DOC were added to #4 on the drug in/out worksheet.

#7 of the instructions - changed the instruction to refer to the statutes rather than putting in the definitions of "dangerous instrument" or "deadly weapon." It was noted that the definitions would be added to the glossary so that it would be easily accessible for people completing the worksheets. If the definition changes in the statute, the glossary can be change. At the end, the code sections were again added to the list of offenses.

The same change regarding nolo pleas in #5 of the drug prison sentence length worksheet was made in regard to counting prior incarcerations.

The worksheets themselves were revised at the bottom for clarification. The space for recommendation was increased and a nonprison option was added, even though it probably was already assumed. Community corrections as probation was also added because defendants are sometimes sentenced to probation and put on community corrections as opposed to straight probation.

Under prison, the committee clarified that a prison sentence would be any sentence to the Department of Corrections, which could include a DOC sentence that goes to community corrections or a DOC sentence which is a split. Ellen Brooks noted that under sentence recommendations there were just points one to seven and it says eight plus – and that technically, 8 was not included. Rosa advised that it should be interpreted as 8 or more points and to clarify this she suggested changing it to read "8 or more."

> Judge Rains questioned how you would consider a defendant that was an 8 pointer and sentenced to a split, to serve 6 months or a year in the county jail. Rosa explained that you would have to look at the whole sentence but that a sentence to county jail was considered as a nonprison sentence.
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> Judge Rains asked whether the judge would be required to list a reason for departure under his example. Rosa answered that the Sentencing Commission would like the judge to list reasons but it would not be required. When asked if the Committee had considered standardizing reasons for departure by including common reasons with check blocks, it was explained that a list of reasons had been started and that there had been some consideration given to developing a standardized form. It was noted that the Commission had been receiving some good reasons back from the pilots, which might be incorparated later, but initially it was thought better to have the judges state their own reasons.

On the property prison in/out worksheet the same change regarding prior incarcerations was made on #5. It was explained that on this sheet, prior

incarcerations with a sentence imposed of less than one year were included. Another change was made to add community correction sentences.

#9 on the property prison in/out worksheet, possession of a deadly weapon, was amended to refer to the statute defining "deadly weapon." "Victim injury" will be added to the glossary and a reference to the statute defining the term included.

Under most serious offense at conviction rankings, code sections were added.

It was noted that there were no mitigation factors included on any of these worksheets. The reason the committee chose not to get into mitigation and aggravation was because the standards were completely voluntary and those are reasons that the judge would include when he explains why he chose to follow (or not follow) the recommended sentence. Mitigation factors are things defense lawyers would argue to the court as to why the sentencing standard is too high and the district attorneys will come back and argue why it is too low.

A member of the Commission asked why there was no indication about whether a defendant had counsel in regard to counting prior misdemeanor convictions. The answer given was that these standards are voluntary recommendations developed on what the criminal records showed as prior convictions, with no effort to determine whether the convictions were counseled. This too would be a matter that the attorneys could raise and argue at sentencing. The worksheet scores merely mimic a judge's decision when he looks at the PSI which contains all of this information.

Judge Colquitt reminded the Commission members that one of the major concerns that had been raised by people around the state in regard to the standards was that they had to be simple - easy to look at and easy to address. He noted that every time a factor was added they get more complex, explaining that these issues were not really geared to our recommendations, but rather, to the sentencing authority. He explained that the judge determines whether or not the law authorizes the consideration of a prior conviction; that's a judicial ruling. We are just asking that a block be checked on the worksheet if there are priors present; the judge then decides whether or not it is useful. Judge Colquitt stated that the Commission could not get involved in weighing mitigation or aggravating factors for these purposes, without moving more toward a mandatory type scheme and getting into the various issues that the federal sentencing commission and other mandatory sentencing systems now find themselves. He reminded the members that the worksheets and standards were modeled after those used in jurisdictions where the court deals with voluntary standards. It is basically determining the range that is most often used by judges across the state for this type of offender and offense. How to determine what the situation is, is a matter for prosecutors and defense attorneys to present to the judge, and also probation officers, and for the judge to rule on. Once that ruling has been made then the appropriate score is entered. Judge Colquitt noted that there had been a lot

of work done in developing the worksheets and reminded the members that the worksheets were not intended to circumvent the decision-making role of the judge or the advocacy role of the parties in the case. He explained that they don't answer those questions because those types of questions are answered before they ever complete the worksheet. Judge Colquitt further clarified that the factors being considered on the worksheets are not the same type of mitigating and aggravating factors required to be considered for capital sentencing. He reminded the members that the Commission had looked at the history of judges' sentencing patterns across the state and developed structured ranges based on those practices. The sentences were based on the consideration of certain aggravating factors and mitigating factors used by the judges. To use federal language, the sense of aggravation and mitigation falls within the heartland of the range. If judges are typically sentencing people to 3 to 5 years, the sentences that were used to come up with a 3 to 5 year range considered such things as absence of a criminal record, juvenile or misdemeanor record, etc. It has already been factored in. On the other hand, there are times in any case (even though these are ranges), where the individual before the court is also going to argue that there is mitigation with regard to this particular person and the State is going to argue that there are aggravating factors justifying sentencing along the higher end of the range. The sentencing range is built considering prior offenses; prior sentences and the ranges were established considering aggravating and mitigating factors. In regard to sentencing within the particular range, parties will argue for aggravation or mitigation within the range. All this does is give the judge an idea of what the range would be and what the typical outcome is.

Rosa noted that mitigating and aggravating circumstances usually fell within that range but that there were those cases that were an exception to the rule. In analyzing the data, the committee determined that approximately 25% of the cases sentenced would fall outside of the standards on either the high end or low end and, in those instances, a judge would be expected to sentence outside the recommended range. She stated that upon preliminary review of the completed worksheets from Jefferson County, the breakdown between those cases in which the standards would have been followed and those cases in which the judges would have chosen to go outside the standards was exactly 75/25. This sample included a total of 162 convictions; 40 of which were exceptions and 122 that were within the ranges. Ellen Brooks stated that she would expect the numbers of exceptions to diminish. Rosa also noted that as the Commission reviews completed worksheets and reasons for departure, the Commission might recommend changes in the future. She stated that this was one of the beauties of this type of system - the Commission could make needed adjustments to the sentencing ranges in the future.

Emphasizing that, unlike the federal guidelines, these standards were voluntary; Rosa explained that these standards were truly guidelines or sentencing recommendations - not presumptive sentences. She noted that they provide information to the judge, advising him/her that if certain facts exist then this is a standard that can be applied. The judge does not have to follow the standards, nor does (s)he have to give a reason for not following the standards. (S)he may enter any sentence authorized by statute. The Sentencing Commission staff collected this information from cases and pre/post-

sentencing investigation reports based on past sentencing practices. Again, it was emphasized that the sentencing standards being proposed were in no way presumptive.

> #5 and #7 on the property prison sentence length worksheet – the same changes made on the drug worksheets were made on this worksheet. On the in/out worksheets, the same changes were made as on the drug in/out worksheet and on the prison sentence length worksheets.
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> On the personal instructions the same changes on #3 and #5 regarding prior incarcerations and the possession of a deadly weapon or dangerous instrument were made. The statutory cites were added to the offenses.
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> On the prison sentence length worksheet for personal offenses, the same changes to the instructions were made under #3 & #4 that were made to the other worksheets. Also, the same changes were made to the bottom portions of these worksheets that were made to the other worksheets.

Judge Rains noted that a typo that should be corrected: in Paragraph 9 on the yellow sheet the term "nolo contendere" was used with "nolo" in italics and in the next sentence the term used was "non contender." It should be corrected to "nolo contendere, " and it should all be in italics.

Ellen Brooks asked Rosa if she said that nolo contenderes were *not* to be counted under the Habitual Offender Act. Rosa answered in the affirmative, saying that they would *not* count. She explained that the Commission was not changing the law for application of nolos to the Habitual Felony Offender statute, also noting that life without parole sentences fell outside of the standards. However, she stated that for purposes of the worksheets and standards, they would be counted.

Ellen Brooks moved to make the corrections raised by Judge Raines. The motion was seconded and passed.

The report of the Standards and Worksheet Committee was adopted by the Commission.

**Legislative Committee**

Lynda Flynt, Director of the Sentencing Commission provided members with copies of legislation considered by the Legislative Committee, explaining that many of these bills were the same ones introduced last year and the same ones that were considered in the Commission's October meeting. She stated the ones that were new were the access to juvenile and youthful offender records, amendment of the DUI statute, amendment of the split sentencing statute, amendment of burglary I & II statutes, and correction of the theft of property 2nd statute. She briefly reviewed each bill:

***Sentencing Standards***

The sentencing standards bill is basically the same bill that was introduced n last year's Regular Legislative Session, but did not pass. Lynda stated that there really wasn't any opposition to the bill, the Legislature just had other matters on their agenda, like money, that were more important and they wanted more time to study the standards and get input from defense attorneys, judges and prosecutors. To comply with their request, the Commission conducted 12 workshops over the summer to explain the standards to Legislators, judges, prosecutors, defense lawyers, probation and parole officers, community correction officers, court clerks and the general pubic. Lynda told the Commission members that by conducting these workshops the Commission was able to address some of the opposition that came up which were based merely on rumors – i.e., that these standards were going to be like the federal guidelines, required complicated mathematical computations, were appealable, etc. She said that in these workshops the Commission emphasized that these standards were completely voluntary and not appealable and that they were the first step toward truth-in-sentencing. She noted the changes made from last year's bill were: the implementation date (effective date) was changed to Oct. 1st 2005. In addition, minor corrections were made regarding the number of offenses that these covered. There were 27 offenses last time, and it was reduced to 26.

Rosa noted that the committee had previously included the offense of sale of marijuana to a minor and other than to a minor. Because the sale to a minor is a separate offense by statute and because we didn't have sufficient data regarding convictions for this offense, it was eliminated from the drug worksheets.

Judge Rains expressed his concern that the Sentencing Reform Act still indicated that the truth-in-sentencing standards would become effective Oct. following the 2006 Regular Session. Based on that date, he noted that there would only be a short period of time - from Oct. 1 to 2005 until Oct. 1 2006 - for the initial voluntary standards to be in effect. He reminded the Commission members that over the last several years they had talked about there being at least a two year period for practitioners to use the initial worksheets and standards. Judge Rains warned that if this date was not changed, there would be less than a year for these initial standards to be in effect, which was not enough time. Lynda noted that Judge Rains' point was well taken and that the Commission should go ahead and address that in this legislation. She suggested that a provision could be included that simply said that the implementation of the truth-in-sentencing statute was hereby extended to Oct 1, 2007. Rosa suggested that it might be better to amend the Sentencing Reform Act of 2003 by a separate bill. Lynda mentioned that they had been cautioned more than once by other sentencing commissions of putting in separate pieces of legislation, in the event one passes and the other doesn't. Judge Colquitt suggested that we could simply amend the standards bill, but that the title would need to be changed to reflect that it was

amending the sentencing reform statute. That would keep it all in one package and avoid having one bill pass that does something and the other one dying in committee. Rosa stated that we could add a new section 3 to the standards bill to include this provision, if that was the pleasure of the Commission. Judge Rains stated that he was concerned that two years was too little time for the initial standards to be used before truth-in-sentencing standards are proposed. He asked if the Commission would recommend amendment to provide that the Truth-in-Sentencing standards be proposed and implemented in 3 years and make that 2008? Rosa noted that the Attorney General might oppose changing the implementation date for Truth-In-Sentencing for three more years. Ellen Brooks stated that she would like to go along with Judge Rain's first suggestion and if next year we see we have a mess we can always go back and ask for an extension. Rosa said that if the Commission is to develop Truth-In-Sentencing standards in two years the Commission would have to start working on them immediately, which would be hard, especially considering the training that needs to be done over the summer if these first standards pass.

Judge Rains reiterated his concerns, recommending that the Truth-In-Sentencing standards be put off for more than two years so that there is a sufficient period of time to test the initial standards, emphasizing that two years was not enough time for adequate trial and error testing by the judges and DAs. Rosa opined that from her point of view, we should wait and if it is seen that more time is needed, we could discuss it at a later date. She noted that as the Attorney General's representative to the Sentencing Commission, her authority to extend the time for developing and implementing Truth-In-Sentencing did not exceed 2 years. She noted that part of the commitment being made to those who want us to go immediately to Truth-In-Sentencing is that we are committed to that and committed to doing it in the least amount of time possible. However, if the first standards do not work, then pursuing Truth-In-Sentencing will not be possible. It is imperative that the Commission makes sure that these initial standards work.

Judge Colquitt said it might be more appropriate if we came back in a year and a half or two years and have a recommendation that we extend for an additional year than to extend it now, noting that the Commission had already been delayed for one year in the implementation of the initial standards. Rosa said she thought that our report to the Legislature should include a recommendation to extend the date for Truth-in-Sentencing 2 years. She noted that in accomplishing Truth-In-Sentencing there were factors that must be completed along the way and part of those factors are funding community punishment alternatives, funding transition opportunities, funding the Department of Corrections to the extent that it needs to be funded to run a prison system to house folks who are going to stay a long time. Otherwise, Alabama is not going to have Truth-In-Sentencing; the federal courts will intervene and start releasing people. Rosa agreed with Judge Rains that in order to accomplish Truth-In-Sentencing we would first have got to make the system ready.

Judge Rains moved that the Commission ask the Legislature to extend the time for proposing Truth-in-Sentencing for two years - to 2008. The Motion was seconded by Ellen Brooks. The Motion carried.

***Statewide Access to Juvenile and YO Records***

Lynda Flynt requested that the Commission propose legislation to grant probation and parole officers, district attorneys and other court personnel statewide access to juvenile and youthful offender records to be used for sentencing purposes. She explained that under existing law, statewide access is not provided to judges, prosecutors or probation and parole officers. She noted that juvenile delinquency and youthful offender adjudications were found to be statistically relevant factors in determining sentencing outcomes and that these factors were, therefore included on the worksheets. She explained that statewide access was needed to properly fill out the worksheets. Bill Segrest asked if making these records available to judges, prosecutors, victims, probation/parole officers and court personnel would cause any difficulties and whether the Commission was proposing to make the records available to defense attorneys. Lynda replied that direct access to the records would be limited and did not include defense attorneys. AOC would have to work out how limited access could be provided. She stated that defense lawyers were entitled to their clients' records and would have access to those records through the court or the prosecutor. It was noted that these records would be available to the defense through either the probation office, the judge, or the district attorney prior to sentencing; however, defense attorneys would not be given direct access to the system to access the records to protect the integrity of the confidential proceedings.

There was further discussion proposing the defense attorneys be included as "other court personnel" for the purpose of assisting/calculating the guidelines or representing their client. Lynda noted that providing limited access may be impossible from a practical point of view. It was suggested that perhaps the court clerks could provide this information to the defense attorneys during the course of the attorney's representation, upon proof of such representation with a Waiver signed by the client. Ellen Brooks noted this procedure would place too much of a burden on the circuit clerks office, pointing out that 90% of these worksheets are going to be filled out by the prosecutor and the prosecutor would have to provide the information to the defense attorney when the worksheet is presented to the defense. Ms. Brooks also noted the access here is not different than the NCIC access that defense attorneys currently do not have. It was also noted that the defense has access to the offender to determine whether there have been prior juvenile or youthful offender adjudications which, of course, the State does not have.

Judge Rains mentioned that there were practical problems with providing defense attorneys access to AOC's database because, once granted, there was no way to limit access to that particular case or the current offender. He noted that

there was merit to the suggestion that defense attorneys should be able to test the information given to them by the district attorney. Ms. Brooks explained that what is being proposed was really no different than what was happening now for criminal records from another state. She explained that the DA tells defense council, "I have 3 priors on your client from Wisconsin." The defense attorney talks to his client and comes back and says, "We think there are only 2 priors." The DA either accepts the 2 priors or begins the process to prove the 3. Judge Rains noted that in that instance, the defense lawyer could go to the court and get the record. Ms. Brooks replied that the lawyer could now get a subpoena and get the juvenile and youthful offender records if it should become an issue.

Ms. Davis noted that prior adjudications are currently provided to defense counsel through copies of the pre-sentence reports. Here they are provided as part of the worksheet. Ms. Brooks noted the proposed procedure is really no different that what happens now. There was further discussion on this issue, with comments from persons who came to observe the public Commission meeting.

Judge Colquitt raised a point of parliamentary procedure concerning the length of discussions and comments from members of the public and Commission members. Judge Colquitt noted what was being considered was a report of a committee to the Commission members, recommending legislation for the Commission's approval. He noted that the Legislative Committee had addressed these issues over a period of months, and that these discussions included much serious debate. The issue was now before the Commission for the Commission members to say whether the Commission should approve, disapprove, modify or amend the committee's report. Judge Colquitt stated that it is a violation of Robert Rules of Order for nonmembers of the Commission to debate the action of the committee or the Commission at this point. He noted that during several meetings the Commission had asked for comments from the public and stated that any group or individual who wished to come before the Commission could do so by notifying the Commission that they wished to be placed on the agenda. Judge Colquitt explained that a public meeting did not mean that the Commission would reopen matters that had already been addressed by the Commission or committees after months of debate. Colquitt further noted that members of the Commission could address additional issues, but stated this was not the time to completely re-debate the committee's work.

Judge Rains then noted that the statute allowed the judge to grant access to others than those specifically named, so there would probably not be a problem. Ms. Brooks moved and Judge Rains seconded that the Commission adopt the report of the Legislative Committee and approve the bill for submission to the Legislature during the 2005 Legislative Session.

**DUI Statute**

Lynda explained that the Legislative Committee had recommended an amendment of Section 32-5A-191, *Code of Alabama*, 1975, to authorize the use

of out-of-state DUI convictions to enhancement punishment under the provisions of that statute. As currently worded, the statute has been interpreted to allow the use of only in-state convictions of DUI as prior convictions. There was some question as to whether municipal ordinance violations, in-state or out-or-state could be used for enhancement purposes under Alabama's DUI statute. Although the issue has not been addressed by the appellate courts, to clarify the statute, the amendment was made to expressly state that they should be counted and considered for enhancement purposes. Ms. Davis moved to accept the committee's recommendation. The motion was seconded and adopted for the DUI amendment to be included in the Commission's legislative package.

**Maximum Fine Bill**

The Commission members were told that this bill was the same as the bill introduced last year increasing the maximum amount of fines that could be assessed for felonies and misdemeanors. Ms. Flynt explained that this increase was justified based on the inflation index and increase in amounts since the fines were initially designated in 1977. She also explained that other states have already made this change and this amendment would bring Alabama in line with other states. The committee voted to include this bill in the legislative package The Commission adopted the committee's recommendation...

Ms. Flynt explained that this bill was not a revenue-raising measure and that it would be difficult to determine the extent that this bill would actually cause an increase in the amount of fines collected.

**Drug Traffficking Bill**

Lynda advised that the next bill the Legislative Committee considered and voted to include in the Commission's legislative package would establish fine amounts for the most serious trafficking offenses, i.e., those with involving the greatest quantities of drugs. She stated that this bill is the same as included in last year's legislative package. In addition, this bill also corrects an oversight or typo in the statute - failure to provide graduated fines for one of the trafficking offenses - trafficking in hydromorphone.

**Pardons and Paroles Facility Fee**

This bill was introduced last year with two changes for this year. The bill allows Pardons and Paroles to charge a fee in the same amount as charged by community corrections programs for overnight facilities. The bill adds 20% to the 25% that can already be deducted from an offender's wages, 10% to pay court costs, fines and court ordered fees, and 10% to pay victim restitution. This is consistent with the way the community corrections act is now worded and the amount that can be deducted from under state work release programs. What is different in this bill from last year's bill, is that if court costs and fines have been paid, then 10% of the wages originally deducted for those costs can be applied to

victim restitution. Lynda explained that the second change was on the bottom of Page 3 starting with line 22 & 23 and at the top of page 34 lines 1-3 regarding the fund that the deductions should be deposited in. She explained that this is the language that the Executive Fiscal Office recommended.

It was moved and seconded that the Commission adopt the report of the Legislative Committee on this bill. The motion carried

**Split Sentencing Statute**

The Committee recommended an amendment to the split sentence statute to conform to practice. An appellate court decision, *Hollis v. State*, held that, when probation is revoked under a split sentence, the judge's only alternative is to imprison the defendant for the remainder of the sentence. This bill allows the judge not only to revoke for the entire time but revoke for portion of the remaining time on the original sentence. The bill would also clarify the fact that you could have a reverse-split sentence. The language changed is noted on Page 39 of the committee report starting with line 12 going through line 17. Section 15-22-54, the general probation statute, is also amended. on page 40, lines 2 thru 4, allowing for revocation and ordering the offender to attend a substance abuse community punishment and corrections program, which could include residential facilities operated by the board of pardons and paroles.

The recommendation for change to the general probation statute at the bottom of page 40 starting on Line 19 is to clarify that under a split, the period of probation may exceed 5 years. This is consistent with current case law holding that probation on splits is not subject to the 5 year limit in Section 15-22-54.

On Page 42 at lines 10 & 11, Section 15-22-54 is amended to provide substance abuse and community corrections programs as appropriate sentences upon revocation of probation.

The Last proposed amendment to Section 15-22-54 is in subsection (3) on page 42. Here, the amendment is to delete any reference to ½ credit or anything less than full credit for time served outside the prison walls by striking out the last two words on line 14 through the end of line 20. This is the same language that was amended out of the community corrections statute in 2003 that gave a judge discretion to give half time credit to inmates on community corrections. This amendment is recommended to make sentences more uniform. Because this language was deleted from the community corrections act, it should also be deleted here.

A motion was made to adopt the committee's recommendations.

There was a discussion concerning the judge's authority under the amendment. It was clarified that the amendment gives the judge the authority to

modify the period of incarceration or the period of probation upon revocation, but not to extend the original sentence.

Ellen Brooks further commented on this provision, stating that she wanted to make sure that we all understand that what are doing is again playing with sentencing in the sense of making it vaguer so that victims, prosecutors, defense attorneys really don't know how much time they are going to serve. She stated that this bill was benefiting defendants, in the sense that the entire sentence will not have to be served. Ms. Brooks stated that she was concerned because in the past splits had been used under the assumption that some of the defendants would never make it on probation, and they would end up in prison for whatever sentence until Board of Pardons and Paroles let them out. She stated that she just wanted the Commission members to understand this and that with this bill we were really moving away from prison sentencing. Ms. Brooks added that, she did not want her comment to be misunderstood to mean she thought everybody who violates probation in any way should go off to prison for the whole time. Concluding, she stated that she was not really opposed to the bill, but she was not for it either. She said that she guessed she was waiting for 2 years and Truth-in-Sentencing.

Bill Segrest stated the interest of the probation authorities is to allow a judge, when a probationer comes before a judge on a revocation, to have the option to modify the conditions of the probation and options such as ordering the person to go through a transition center and participate in the programs that they offer for a period of time. He noted that some judges have been doing that and he would like to make sure that the statute expressly provides for that authority. Ellen Brooks noted this is the practice in her circuit

Judge Rains stated the issue arose out of a case in Montgomery county where a judge split the sentence and when probation was revoked the judge wanted to split the sentence again. A second split is what he wanted to do and that's what the court said he couldn't do. The language on Page 39 that is underlined says that upon revocation of probation either prior to or after serving a term of incarceration the court may impose any of the sanctions authorized which may include incarceration…". He explained that the reason he was reading that provision is because that he did not think it was limited to revocation – it was a sanction. Judge Rains noted that if a defendant violates the terms of probation and the judge does something other than impose the full remaining period of their sentence, then you impose a sanction. It is that kind of language that is ambiguous. The thing that this bill is supposed to do is enable judges to tighten the screws and do whatever we have to do, short of sending them to prison for the full amount of the remaining sentence. He stated that "revocation" was a term of art, which he considered meant sentencing a probationer to prison for the remainder of their sentence; anything short of that would be a sanction rather than a revocation.

Ellen Brooks noted that the sentence before the one the Judge read said that the court "may revoke or modify" and that it should just say upon modification of probation." She noted that Judge Rains was of the opinion that serving a period of incarceration under a split was a condition of probation.

Judge Colquitt noted under the U.S. Constitution, decisions hold that to commit a probationer to a higher penalty for violating a condition or probation, due process is required in the revocation process. Judge Rains agreed that this was required for revocation.

Judge Colquitt stated that the Commission agreed that a judge should be authorized to allow a probationer to serve his time on an installment plan, and that every time he violated, the judge would have an option. The judge could revoke it in part, or could revoke it as its entirety. He noted that the problem Judge Rains had was with the word "revocation." Judge Colquitt stated that it would be proper for a judge to say that he revoked probation in order that the defendant serve a portion of the sentence, as opposed to all of it and do it in a way that clarifies what we are trying to say. He explained that what the Commission was trying to say is that we disagree with the Court of Criminal Appeals decision in *Hollis* which held that the only thing that the judge could do upon revocation of probation under a split was to keep the person on probation or send them off for the whole time. We are saying no the judge should be authorized to send a defendant off for part of the time or divert him to some treatment facility; thereby empowering the court to have multiple options about what to do with somebody who has violated a condition of probation.

Rosa stated what the amendment allows the court to do is to keep the sentence hanging over the probationer's head longer because the court retains jurisdiction to impose additional conditions of probation, including interim short periods of incarceration rather than sending them off and letting them recieve "good time," and getting out without any supervision.

Judge McLauchlin noted the way this normally works is a probation revocation hearing is set with due process provided. At the end, the judge either revokes and keeps him on probation with additional conditions or simply revokes probation and imposes the remaining sentence.

Judge Rains suggested changing the sentence to say, "upon violation of a condition of probation, either prior to or after serving a term of incarceration, the court may impose any of the sanctions authorized, which may include incarcerating the defendant for any portion of his or her suspended sentence." This language would clarify that it is a sanction imposed for a violation of probation but it's not a revocation. He reiterated that the term "revocation" to him has a completely different meaning than sanction.

Lynda stated that she used the word revocation because that's what the case says. Upon revocation it was all or nothing and a lot of judges did not understand this to be the law.

Judge Colquitt noted that before caps were put on the length of probation, if someone violated probation the judge would extend the term of supervision. That's not exactly a revocation it's a sanction, and that is what Judge Rains is saying.

Judge Rains and Ellen Brooks noted that we all understood what we were trying to accomplish. Ellen said that although she didn't completely agree, she understood.

Judge Rains suggested that different language was needed so that we would not be using the term "revocation and the matter should be given a little more study to come up with the right language.

Ellen suggested combining the two, i.e. "upon a violation of probation whether resulting in revocation or not. Judge Rains suggested it would be less ambiguous to simply say upon violation of condition of probation, either prior to or after serving a term of incarceration. Judge Rains moved to amend Line 14 thru 17 on Page 39 to read as follows: "upon determination of a violation of a condition of probation either prior to or after serving a term of incarceration the court may impose any of the sanctions authorized in section 15-22-54 of the code of Alabama 1975 which may include incarcerating the defendant for any portion of his or her suspended sentence." Dr. Harris Seconded. The motion was adopted.

The Commission voted to send this bill to the legislature

Lynda next revieved the new bills proposed by the legislation committee.

**Implementing the Loot Rule for Burglary I and II.**

This bill amends the burglary 1st and 2nd statutes to apply the "loot rule" for deadly weapons in determining whether the offender used a deadly weapon or dangerous instrument in the commission of these offenses. Under current cases law, the courts have held that if a burglar acquires a deadly weapon, even as merely loot, in the commission of a burglary, the acquiring of the weapon means that the weapon is used during the commission of the burglary. Under this proposal, the burglar would have to actually use or threaten to use the weapon against another person in the commission of the offense or in immediate flight from the scene. The committee added language that starts on Page 44 reads: "in effecting entry if armed with a deadly weapon or while in the dwelling or dangerous instrument or use or threaten to use the deadly weapon or dangerous instrument against another person." The committee recommended deleting the language "is armed with "a deadly weapon."

In response to a question from Bill Segrest, Lynda Flynt stated that if a person is armed with the deadly weapon when he affects entry into a dwelling, that is still burglary 1st, see Page 45 Line 13.

Judge Colquitt noted that there was a split around the country regarding burglary where firearms were possessed. A lot of the states provide that a person commits a burglary while armed if they use or threaten to use any weapon and some states say if they have a gun. He noted that our present statute was really written with the idea that if a person uses or threatens the use a gun; however the courts decided just taking a gun doing a burglary constitutes being armed, which probably expanded the law. This amendment provides that if a person goes into a building armed with a deadly weapon, it is an aggravated form of burglary. If they go in and take a weapon it's not an aggravated burglary unless they use or threaten the use of it. Judge Colquitt explained that this was really a modified version that incorporates both thoughts in other states; a person going in armed is covered and if the offender takes a gun while they are in there and then presents it or threatens to use it in any way, they are also considered "armed." It does not cover a situation where a burglar goes in and dumps every thing in the closet into a sack and is going out and in that sack there happens to be a gun – even if the gun is in a sealed container such as a safety box. He noted that the courts have not addressed that issue yet, i.e. whether a defendant knew there was a gun in the box. He said that it is arguable that under current law, a burglar would be considered armed even if the gun was not assessable to him, e.g., he just possessed it but it was not readily assessable because it was in a sack or box. Judge Colquitt stated that it was a policy call on the part of the Commission, whether the members agreed to propose this change that would basically tighten up the statute somewhat, while being consistent with the idea of public safety. He noted that it does retreat from the existing interpretation of the statute with regard to whether a person possesses a weapon or uses a weapon.

Ellen Brooks moved to change Page 45 Line 16 where it starts "the fact . .". Strike lines 16, 17, 18 & 19 and lieu thereof use "the use of or threaten use of a deadly weapon or dangerous instrument does not include the mere acquisition of a deadly weapon or dangerous instrument during the burglary."

On Page 46 Line 5 there is a typo starting in parenthesis 3 underline all in line 5, 6 ending with person in Line 7 strike "uses or threatens the immediate use of dangerous instrument" and underline the remainder of 8, 9, 10 & 11.

Lynda said she wanted to make it clear that this bill was not one that was approved by the legislative committee, but it was drafted based on the recommendation of one of the committee members.

Rosa noted that there was a motion to amend the bill and to include the changes that have been suggested on Page 45 & 46. The motion was seconded; and it carried.

Ellen asked how this change would be applied to pending cases. Judge Colquitt noted it is standard law that unless a statute actually has some type of provision for retroactivity, the definition of crime used is that which existed at the time the offense was committed.

**Theft of Property**

Rosa Davis explained the Theft of Property 2nd proposal, noting that during the 2004 Legislative Session a bill was introduced to change the words "horses" and "mules" throughout the Code to "equine" and "equidae". Because these terms are used in the theft 2nd statute, that statute was amended. In making that amendment, the pre-2003 form of the theft 2nd statute was inadvertently used, rather than the new statute with the amendment proposed by the Commission in 2003. Because of this drafting error, the 2003 amendments to the theft 2nd amounts were amended out of the statute when the "equine" and "equidae" bill passed. This caused a change in the theft of property 2nd law – after the Acts effective date in 2004, it was no longer against the law in Alabama to steal money or property valued at $500 to $1,000. She emphasized that this was merely a drafting error that the proposed bill seeks to correct. Rosa said that it was her understanding that the President Pro Tem had agreed to sponsor this legislation so that the Theft 2nd statute could be corrected the way we had gotten it changed in 2003.

Judge Colquitt moved for the adoption of this recommendation. The motion was seconded and the Commission voted to include this bill it the Commission's legislative package.

**Medical and Geriatric Release Bill**

Lynda next noted the Legislative Committee voted not to pursue the Medical and Geriatric Release Act bill (Page 52), which was recommended last year. She advised that the bill included in the handout was substantially different from the bill as approved by the Commission and as originally introduced. This bill was sponsored by Representative Linda Coleman and represents a compromise between prosecutors, the Southern Poverty Law Center, Human Resources, Pardons and Paroles, and victim's advocates. Lynda explained that the Legislative Committee voted not pursue the bill, but voted to request that the Board of Pardons and Paroles adopt and publish administrative procedures for inmates that would be eligible for release. She said that according to stats provided by the Department of Corrections, there are currently 15 geriatric inmates that could be affected. There are now 15 geriatric inmates over 70 suffering from a chronic illness relating to aging; 311 incapacitated inmates; and 52 terminally ill inmates, utilizing the bill's definitions. According to bill, the term "permanently incapacitated" is defined to mean a state inmate convicted of a noncapital felony offense or not serving life without parole sentence to the penitentiary if he doesn't constitute a danger to himself/herself or society and his existing medical condition terminal or permanently incapacitating and as a result of the medical condition he requires long term residential care.

Bill Segrest noted that Pardons and Paroles is not required to publish administrative regulations and procedures, but noted that the Board has adopted administrative procedures, which are included on their website. He said that the Board gets about 50 letters a week from inmates claiming to be sick or incapacitated. The Board checks on these requests and occasionally finds a valid request. The inmate is considered for Parole if he has not already died.

Lynda noted that last year's bill was designed to provide time limits and establish a uniform procedure for applications, review and Board consideration.

Bill Segrest described the procedure currently used by the Board. He said that when the Board is notified that an inmate may be drastically ill and requests parole consideration, the Board sends a request to the health care giver and DOC for a medical update and a prognosis of the individual. DOC then provides the Board with a photo-copy of his medical records. He said that this is too much information and the Board is not equipped to read and interpret the records. What the Board needs to know is if this person is going to live 6 months, is he ambulatory, can he take care for himself or not care for himself, does he have a family that is willing to care for him. Lynda suggested the Board provide a form that can be filled out by the DOC health care provider.

Bill Segrest moved the adoption of the Committee's recommendation.

Rosa Davis moved to table the proposed bill and to ask P & P and DOC to address the issues. Motion was Seconded and majority favored.

**First Time Felony Offender Bill**

Lynda – The next new bill considered was the first-time felony offender bill listed on page 66 of the handout. Lynda reminded the members that this bill was considered by the Commission last year but was not approved for introduction. In addition, she reminded them that the results of research on this issue had been previously provided to the Commission. She explained that the proposed bill would apply to certain offenders charged with a crime who haven't had a prior felony conviction or youthful offender adjudication. The proposal bill would authorize sanctions with suspension of the sentence (with or without probation), not to exceed 3 years, or would allow a judge to impose a fine (with or without probation or commitment), and authorize commitment to DOC, but for no more than 3 years. In addition, under the bill's provisions the records of the first offender would not be open as public inspection and could not be considered as a conviction except for purposes of enhancement under the Habitual Felony Offender Act. The proposal also includes a provision to grant the Sentencing Commission access to that information.

The Legislative Committee voted not to pursue a first-offender bill this year, but did request further research.

Chris Booth, a staff attorney for the Commission, explained the results of his research, stating that there were multiple ways that this type of procedure was handled

from state to state. Many seemed to be what they called "judicial withholding of adjudication." In Tennessee this process is called a judicial diversion program, which is equivalent to a DA's pretrial diversion program, but putting it in the hands of the judges and letting them decide who would be eligible.

Lynda noted that there was a wide range of definitions of "a first offender," noting that Arkansas defines prior conviction as someone who is sentenced and incarcerated in the penitentiary. She also noted that many of the statutes provided for the sealing or expungement of records. Lynda stated she was concerned with this aspect, since expungement of records affects the completeness of data used by the Sentencing Commission and its ability to analyze real criminal history and sentencing trends. She noted that this problem already exists with some DA pretrial diversion programs and drug courts. One judge does not know the offender before him has been to 5 drug courts in 5 different counties or accepted into a pre-trial diversion programs in another county because no records are kept. The Sentencing Commission is working on these issues now and hope to propose a solution to these problems.

The Committee's recommendation is that the Commission continue to study this issue. The recommendation was seconded and the motion carried.

**Supplemental Appropriation to The Department of Corrections for Community Corrections.**

Rosa Davis made a motion that the legislative package include a request for a supplemental appropriation to the Department of Corrections to fully fund Community Corrections in Alabama, up to $5.5 million. She noted that there were a number of reasons for proposing this bill. The Sentencing Commission was charged with looking at the structure of sentencing and corrections in Alabama and making recommendations where changes need to be made. In 2003, the Commission recommended the creation of a special fund for community corrections and that the legislature annually appropriate 5.5 million dollars to that fund. The Legislature created the fund but has failed to fund it at the recommended level. Sentence reform in Alabama must include the expansion of community punishment alternatives such as community corrections. Mrs. Davis stated the Commission cannot abandon this proposal for Community Corrections and that these funds should be in addition to funds sought by Commissioner Campbell for institutional operations and funding of anything else in the Department of Corrections. She recognized that the DOC has been underfunded in the past, but in order to expand community corrections programs additional earmarked money is necessary. Rosa encouraged the Commission to support funding for what Commissioner Campbell needs to run institutions, as well as what is needed for community corrections expansion in Alabama. Judge Rains seconded the motion.

Bill Segrest noted that this bill is not part of the Legislation Committee's recommendation. Ms. Flynt stated the matter had been tabled earlier to give Commissioner Campbell an opportunity for comment. Commissioner stated that he would not oppose the bill but would probably abstain from voting. Ms. Davis noted that she and the Attorney General support adequate funding for the Department of Corrections

and this bill should not detract from anything requested by the Department of Corrections.

There was some discussion of the proposed bill and Judge Colquitt suggested that a sense of the Commission be taken and the staff prepare the legislation to meet that decision. The motion received a favorable vote. The sense of the Commission is that Community Corrections be funded to the original $5.5 million request and that these funds not detract from Commissioner Campbell's requested appropriation for the Department of Corrections. Commissioner Campbell abstained from voting.

**Request for input for future projects.**

Lynda requested input from Commission members, the public, and the Advisory Council on any additional legislation that should be considered. Rosa Davis noted there were a number of matters the Commission would study over the next year

Judge Rains suggested that the pre-sentence report categorize the criminal history by felonies and misdemeanors rather than chronologically, stating that this could be chronological within the categories of felony and misdemeanors and also juvenile. This would make filling out the worksheet easier because the pre-sentence report would group priors in the same manner as the worksheets. Having completed many of the worksheets recently, Judge Rains said he believes that this would make PSIs more user-friendly with the worksheets.

Judge Rains second suggestion was that DOC consider using the worksheet scale rather than the 10 point scale for Community Corrections eligibility. He said tthat the amount of money that community corrections programs get from DOC depends on whether those cases qualify on 10 point scale but if they qualify on the 8 point scale that we use, then they ought to qualify for that money. Lynda Flynt and Rosa Davis agreed this is a good suggestion and should be brought up to DOC for consideration.

Rosa noted the purpose of the 10 point scale was to prevent net widening so that Judges didn't just send everybody to community corrections instead of probation. The same purpose is accomplished by the worksheets. It might be that it ought to be an either-or proposition because there are offenses that don't fall under the worksheet.

Judge Rains said that he thought that we should get that straightened out, otherwise we are going to have judges putting people in community corrections and community corrections people won't be getting reimbursed for them.

Judge Rains moved that the executive director make contact with DOC. Ellen seconded and the motion carried.

***Kirby Procedures***

Judge Colquitt noted that in the *Kirby* case the Supreme Court created an impasse. First they said that the Sentencing Commission did not resolve the procedural issues by approving DOC's suggested rules for implementation. The Court then said that it was the

Supreme Court that had rulemaking authority. The Court first says it has the power to do this and then they say the Sentencing Commission did not do it. That creates an impasse. Judge Colquitt stated that he found no need for the Commission to do anything in regard to this matter. He said that establishing a procedure for retroactive application of the HFOA amendments was within the purview of the Supreme Court. Reviewing the *Kirby* opinion, Judge Colquitt noted that the sentencing judge could resentence in two narrowly defined classes of habitual offenders and the Court set out what those two classes were. The Court expressly held that the trial court did not have to have any particular type of action pending before the court, and that review was not through a Rule 32 petition. The Court stated that the Legislature had the power and did give the courts jurisdiction to entertain these matters and the defendant could file a motion for sentence modification with the court. The Court said that what Kirby did was adequate under the statute. They acknowledge that they could promulgate rules of procedure if they needed them but they said that the trial court inappropriately denied Kirby's motion. I don't see anything for the Sentencing Commission to do. Judge Colquitt said that the Court seemed to blame the Commission for something the Commission had no particular role in.

Lynda Flynt noted there was an Executive Order by Governor Siegleman that the Court said was invalid. The Order said the DOC would promulgate a procedure and then they would send that recommendation to the Commission and the Attorney General for their comments and recommendations. After the Sentencing Commission's comments and recommendations, the procedure would be sent to the Governor for approval. Ms. Flynt stated the Court misinterpreted the Executive Order in believing that it was the Sentencing Commission that was required to approve the procedure rather than the Governor. The Sentencing Commission did make its recommendation and did so quickly. Because there was litigation pending at the time and several constitutional problems had been noted, we recommended that this was a matter for the courts to resolve. Ms Flynt asked for direction from the Commission concerning further involvement in the matter.

Bill Segrest suggested that at least one circuit court has heard a *Kirby* motion or petition and said that he thought that the courts are proceeding with implementing the *Kirby* decision. He further suggested that because there is now precedent in Alabama for how to handle a *Kirby* issue, there was no further action needed from the Commission.

Judge Colquitt noted in *Kirby* that the Court of Criminal Appeals had ruled that the trial court had no jurisdiction to hear these types of petitions because there was no action pending. The Supreme Court overruled and reversed the Court of Criminal Appeals and the trial court's finding that the Act was unconstitution, holding that the legislature had the power to give circuit court jurisdiction, which it did in passing the Act. The Court then noted the trial judge said that there was no appropriate motion. The Supreme Court then held that the Act not only provides jurisdiction but it provides that an inmate may ask the sentencing judge for relief and that Kirby did that by filing a motion, therefore, the trial judge was wrong. The Court established that the proper procedure for obtaining review was by filing a motion before the sentencing judge or presiding circuit judge. The Court then goes on and criticizes various entities for not doing anything.

Then they say that the trial judge's only authority is to modify the sentence for somebody who had not previously been eligible for parole under the Habitual Offender Act, prior to amendment. The Court then states that the judge can only resentence in two narrowly defined classes and they set out what those classes are. In addition, the Courts states that trial judges have the authority under the statute to determine whether they are nonviolent and that trial judges are competent to make that determination with information provided to the judge by DOC and the Parole Board. The opinion goes on to interpret the Act as requiring DOC tol conduct an evaluation, says that although the statute is not "a model of clarity" it does provide reasonably clear standards for its execution and administration. It holds that the Court of Criminal appeals erred in declaring the Act unconstitutional. In regard to information from DOC, the Court stated that if DOC did not provide the information then the State would have waived any input with regard to that issue and the judge would just have to go ahead and rule. They setout the process. There is not anything for the Sentencing Commission. If there is a procedure that needs to be set out or clarified, it should be recommended by the Rules of Criminal Procedure committee.

Judge Colquitt moved that the Commission take no action on Kirby issues because it was not an appropriate matter for the Commission's concern at this time. The motion seconded and majority approved.

Judge Colquitt thanked members for a very productive meeting and commended Lynda, Rosa and the staff for all of the work that they had done. He also thanked the committee members for all of their work and invited anyone that wanted to be involved in committee work to let the Commission know.

**Next Meeting Date**

Judge Colquitt stated that because of the work that needs to be done before the next Legislative Session we would have to notify everybody by mail and email of the next meeting date. He announced a tentative meeting date of January 28th, 2005.

There being no further business, the meeting was adjourned.